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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

Petitioner,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Respondent.

MOTION TO DISMISS
and
BRIEF AND ARGUMENT OF RESPONDENT

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IN THE

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No. 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

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vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Respondent.

MOTION TO DISMISS AND BRIEF AND ARGUMENT OF RESPONDENT

Petition for writ of certiorari was granted June 13, 1949. Petitioner has filed no brief in accordance with Rule 27 and the time for filing such brief has long since passed. Petitioner has given no notice either to the clerk or to opposing counsel that she desires to have her petition for writ of certiorari stand as her brief. Accordingly, the respondent submits that the petition for writ of certiorari should be dismissed for failure to comply with the rules of this Court, or, in the alternative, that the writ be dismissed as having been improvidently granted.

In the event the motion to dismiss be denied, petitioner appends hereto its brief and argument for the consideration of the court.

Respectfully submitted,

Harlan L. Hackbert,
Attorney for Petitioner.

STATEMENT OF THE CASE

This is rare case in which a jury returned a verdict for the defendant in a death action under the Federal Employers' Liability Act, a verdict which demonstrates the truth of Mr. Justice Black's statement in *Wilkerson* v. *McCarthy*, No. 53, decided January 31, 1949, 69 S. Ct. 413 at 417, that the "unarticulated assumption * * * that juries will invariably decide negligence questions against railroads * * * is contrary to fact."

We adopt the statement of facts in the opinion of the Court of Appeals (Tr. 224-46; 171 F. 2d 973, 974):

> "The decedent was a switchman employed by defendant and on the night he met his death was working in defendant's yards at Gary, Indiana. The decedent's brother was the conductor-foreman of a switching crew engaged in making up a train of cars on what was known as Track 5. In this yard the lead tracks and the terminal and rip tracks ran in a general east and west direction. Branching off from these tracks in a northeasterly direction were Tracks 1 to 6. From the latter tracks the switching crew was switching cars out upon the lead tracks. As the cars were sorted out on the leads, they were switched into the proper track. There were some 43 cars in on Track 5, filling it from the west to the east. The last three cars pushed in towards Track 5 did not couple to each other nor to the cut of cars already on that track. One car stood about a car length west of the cut, just at the point where a safety sign had been lowered. It was customary to raise this sign in warning when repairs were being made on the track and to fold it down between the rails when no warning was necessary. The other two cars stood west of the single car. The decedent and his brother were standing along Track 1 near the switch when decedent's brother told decedent he was going to pull some cars from Track 1 onto the lead track; the most easterly of these

cars was to be switched into Track 5 and the others into another track. The decedent, in preparation for this movement, went to line up the couplings of the three cars that had not been coupled to the cut of cars on Track 5. This is the last time that he was seen alive.

"The decedent's brother started the switching operation, to put the car into Track 5. This operation, referred to as the first movement, took four or five minutes. This gave decedent sufficient time to walk to the uncoupled cars on the west end of Track 5 and attend to the lining up of the coupling. The cut of cars in the switching operation moving eastwardly toward Track 5, reached a speed of ten miles an hour. As it neared Track 5, decedent's brother gave two successive stop signals but, for some reason not apparent on the record, these signals were not obeyed. The conductor then gave an emergency stop signal, and the cars came to a sudden stop. When the sudden stop was made, the coupler on the west end of the second car from the east end of the cut broke, allowing the two easterly cars to run free and collide under their momentum with the uncoupled cars on Track 5. The violent impact coupled the cars in succession as they moved eastwardly until the most easterly car was coupled to the most westerly car of the cut already on Track 5. This indicated that the decedent had by this time properly aligned the couplers as he had set out to do.

"Shortly after the breaking of the coupler and the collision, decedent's brother proceeded along the north side of Track 5 eastwardly for about ten car lengths, examining the couplings to see if they had all been properly made. His examination was made by turning the light from his electric lantern upon each coupling as he passed along. In addition to his lantern light, the yard was lighted up by a floodlight from the top of a coal chute to the southeast of Track 5. The floodlight cast the car's shadow towards the north. The

cars extended two feet or more out over the rail. When decedent's brother satisfied himself that the couplings were made, he boarded the engine, rode around to the east end of the cut of cars on Track 5, coupled the engine, and moved the cars out east into the terminal yard.

"After this movement, referred to as the second movement, decedent's brother returned to the switchmen's shanty and not finding decedent there, went out to the east end of Track 1 looking for him. Not finding decedent at that point he returned to the shanty. About an hour had elapsed since decedent had been last seen, and his brother became alarmed. Again he went out, searching in the eastern part of the yard as decedent often rode the cars down to the east end when his work in the west part of the yard was completed. The engineer was walking west in the yard when decedent's brother met him and inquired if he had seen decedent. The engineer replied in the negative, and the two proceeded westwardly along the north side of Track 5 until about 15 car lengths east of the west switch on Track 5. The engineer continued westward along Track 5, and decedent's brother turned north to search again on Track 1. Finding no trace of decedent there, he turned back to Track 5 and proceeded westwardly to about a car length east of the safety sign. The decedent's body was found there, lying north of the north rail, close up against it, the right arm and leg severed on the north rail, and the face cut off. The sign was lying flat between the rails with a fresh chip out of it. His lantern was found at the sign and brush marks continued eastward to the point where the body was found, indicating the body had been dragged eastward from the point of the sign about a car length or the distance of the last gap to be closed by the cars following the crash of the two cars that ran in after the coupler broke."

This statement of facts should be supplemented in two respects. There were six cars, not three, which had not coupled at the west end of track 5 (Tr. 37); the westernmost three cars were coupled together, then there was a space of about a car length, then the fourth car, then a little gap, then the fifth and sixth cars and another little gap between the sixth car and the train. (Tr. 37, 78) And after Jack O'Donnell walked along the cars standing on track 5, the crew made a move in the terminal yard, set the single ash or dump car in on the lead to track 5, and then coupled up track 1 from the west before pulling the cars on track 5 out of the yard and around to the east. (Tr. 93-85)

Upon these facts the respondent's contentions are:

(1.) There was sufficient evidence of probative value from which a jury could properly conclude that plaintiff's decedent was not struck in the course of the movement in which the coupler broke as contended by the plaintiff, but rather that he was killed in the final movement out of the yards as contended by the defendant;

(2.) That the question whether the coupler complied with the provisions of the Safety Appliance Act was properly left to the jury under proper instructions by the court.

SUMMARY OF THE ARGUMENT

I

The Evidence Sustains the Defendant's Theory of the Accident—That the Decedent Was Killed in the Final Movement Out of the Yards.

1. See opening statement of plaintiff's counsel (Tr. 21), the opening statement of defendant's counsel (Tr. 25) and the closing argument of defendant's counsel (Tr. 157, 160-169.)

2. It was the function of the jury to determine from the circumstantial evidence whether the decedent was killed on the first movement (as contended by the plaintiff) or on the final movement out of the yard (as contended by the defendant).

Wilkerson v. *McCarthy,* No. 53, October, 1948, Term, 69 S. Ct. 413;
Tennant v. *Peoria & P. U. Ry. Co.,* 321 U. S. 29, 35;
Lavendar v. *Kurn,* 327 U. S. 645;
Lilly v. *Grand Trunk R. Co.,* 317 U. S. 481, 491.

II

The Ruling Below—That the Fact that a Coupler Breaks While in Use is Evidence From Which a Jury May, But is Not Required to Infer a Violation of the Coupler Statute—is Sustained Both Upon Principle and Authority.

Minneapolis etc. R. Co. v. *Gotschall,* 244 U. S. 66;
New Orleans etc. R. Co. v. *Scarlet,* 249 U. S. 528.

1. Since these authoritative decisions, both state and federal courts have uniformly held that the breaking of

a coupler does not demand a finding that the couplers were defective but "at most presented a question for the jury."

Western & Atlantic R. R. v. *Gentle,* 58 Ga. App. 252, 198 S. E. 257, certiorari denied, 305 U. S. 654;

Vigor v. *Chesapeake & O. Ry. Co.,* 7 Cir., 101 F. 2d 865, 869, certiorari denied, 307 U. S. 635;

Cochran v. *Pittsburgh & L. E. R. Co.,* D. C. Ohio, 31 F. 2d 769, 771;

Roberts, Federal Liabilities of Carriers (2d Ed., 1929), §620, p. 1211.

2. In the cases cited by petitioner as being in "conflict" with these decisions, the issue was one of proximate cause, not of negligence

(see:

Reetz v. *Chicago & E. R. Co.,* 6 Cir., 42 F. 2d 50;

Erie R. Co. v. *Caldwell,* 6 Cir., 264 Fed. 947

Keenan v. *Director General,* 2 Cir., 285 Fed. 286)

or the issue whether the coupler was defective was submitted to the jury

(see:

Kowalski v. *Chicago & N. W. Ry. Co.,* 159 Minn. 388, 199 N.W. 178 at 179;

Southern Pacific Co. v. *Thomas,* 21 Ariz. 355, 188 Pac. 268 at 269;

McAllister v. *St. Louis etc. Ry. Co.,* 324 Mo. 1005, 25 S.W. 2d 791 at 796;

Philadelphia & R. Ry. Co. v. *Eisenhart,* 3 Cir., 280 Fed. 271 at 272, 275.

3. To instruct the jury that a single failure to function is conclusive evidence of a violation of the statute is error; the choice between conflicting inferences is for the jury, and a peremptory instruction should not be given.

Wilkerson v. *McCarthy*, 69 S. Ct. 413.

III

There is No Error in the Court's Charge to the Jury.

1. Objection to the instructions must be specific, and made before the jury retires.

> "No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects and the grounds of his objection."
>
> Rule 51, Rules of Civil Procedure.
>
> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."
>
> *Palmer* v. *Hoffman*, 318 U.S. 109, 119.

2. The court properly instructed the jury on the provisions of the coupler state, and left to the jury the question of fact whether the coupler which broke violated the statute.

See cases cited under Point II.

3. The instructions did not confuse negligence with the charge of violation of the Safety Appliance Act.

See Argument.

4. The court properly instructed the jury they could not presume from the fact of the accident that the decedent was killed because of the broken coupler.

Brady v. *Southern Ry. Co.*, 320 U.S. 476, 484;
Tennant v. *Peoria & P. U. Co.*, 321 U. S. 29.

a. The challenged portion of the charge must be considered in connection with the charge as a whole.

S. S. Kresge Co. v. *McCallion*, 8 Cir., 58 F. 2d 931, 934.

b. The objection to the charge did not differentiate between the allegations based on common law negligence and the alleged statutory violations.

Palmer v. *Hoffman*, 318 U. S. 109, 119.

ARGUMENT

I

The Evidence Sustains the Defendant's Theory of the Accident—That the Decedent Was Killed in the Final Movement Out of the Yards.

The contentions argued in the petition for writ of certiorari—whether the breaking of a coupler is "negligence *per se*" or *conclusive* evidence of a violation of the Safety Appliance Act, and whether the jury was fully instructed on every facet of this issue—were not the issues upon which this case was tried and argued to the jury.

From the time the decedent was last seen by his brother, the foreman of the crew, until his body was found, more than an hour later, by the same brother, there had been only two movements along the track where his body was later found. The issue upon which this case was tried was whether the fatal accident occurred in the *first* of these movements, in which the coupler broke, and as to which plaintiff charged both negligence and a violation of the Safety Appliance Act, or in the *second* movement, as to which no negligence of any kind was charged. The directly opposite contentions of the parties were clearly stated in the opening statements to the jury. Plaintiff's counsel said:

> "So, it is our contention that the conclusion is inevitable that the time he was run over and killed, as shown by the physical facts and circumstances, was when the coupler broke loose while he was engaged in the course of his duties between the cars, and that the defective coupler was the proximate contributing cause of this accident" (Tr. 21).

Defendant's counsel stated:

> "Our contention, on the other hand, is that the man was killed during one of the other two movements on Track No. 5—either the movement when the single car went in there, or the movement a little while later when they pulled all the cars standing on Track 5 out of there, and the question for you to decide on the question of liability is which of the movements this accident occurred on" (Tr. 25).

The testimony of Jack O'Donnell, the decedent's brother, showed that the single car referred to had not come in contact with any of the cars on this track (Tr. 44), and defendant's counsel, in his argument to the jury said:

> "What are the facts of this accident? I told you in my opening statement that it was our contention that this injury to Mr. O'Donnell occurred not when these two cars broke off and ran onto Track 5, but on one of the two subsequent movements which were made in that direction, one, when at the close of their night work they set a single car in on that track, or the other, that the fatal accident occurred at the time that all of these cars were pulled eastwardly out of Track 5 and taken around in the general train yard.
>
> "The only man who knows about this accident is Jack O'Donnell, and Jack says the one ash car or dump car that was put in on that track did not come in contact with the cars that were there. I will take his word for it, and we will turn then to the question in this case which I think is controlling, and that is this:
>
> "Was Bill O'Donnell struck and run over at the time the coupler broke and those cars ran in on that track, or was he killed and run over when he was attempting to ride out on that cut of cars as they were being pulled to the east and around the roundhouse to be taken down in the general train yard, which, as

Jack O'Donnell testifies, it was often Bill O'Donnell's habit to do? That is the question in this case, ladies and gentlemen" (Tr. 157).

Defendant's counsel then said this to the jury:

"I [have] know[n] Jack a long time. I don't think that he would sit here on the witness stand and lie about the circumstances. I think, as I say, that he will give his sister-in-law the benefit of every possible inference that can be drawn in her favor. But I will take his testimony and I will assume that it is true. And I say to you, ladies and gentlemen, that taking his testimony and giving it every benefit that you can that would help his sister-in-law's case, I say to you that his testimony shows not only that it was less likely that his brother's death occurred in the course of this first movement. I say too that his testimony proves almost beyond the shadow of a doubt that the time when Bill O'Donnell was run over was as they were pulling the cars out of Track 5 to the east.

That is the question, ladies and gentlemen, and I invite Mr. Ryan in his closing argument to tell you why it is more likely that the accident occurred in the first movement, rather than in the last movement. It is not a question as to whether or not the coupler broke or not. There isn't any dispute about that" (Tr. 160-161).

Defendant's counsel then referred to five circumstances in the evidence which, in his judgment, supported defendant's contention that the fatal accident occurred in the final movement out of Track 5, as to which no negligence was charged. Because it is "the very essence of its [the jury's] function to select from among conflicting inferences and conclusions that which it considers most reasonable" (*Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35), we will only state briefly the five circumstances

relied upon by the defendant, with appropriate footnote references to the testimony which supported the arguments of defendant's counsel, and our answers to the replies which plaintiff's counsel now urges, but which he failed to argue to the jury:

1. The presumption that the decedent, knowing the next move was to be made into this track, would not knowingly put himself in a position of danger between the cars.[1]

2. The fact that all the open couplers of the cars at the west end of the track coupled up following the impact, indicated that at the time of the impact, the deceased had reached a point about 200 feet east of the place at which plaintiff contends he was standing.[2]

---

[1] The decedent had been continuously in the employ of the defendant 23 or 24 years and had worked on this particular job about two years (Tr. 63). Jack O'Donnell, his foreman, told decedent, just before he went down to track 5 (where the accident occurred) that he had one car for track 5, the balance to go to track 1 and the set-backs on track 2 (Tr. 36, 79). The presumption that the deceased exercised due care for his safety having this knowledge, was a proper circumstance for the jury's consideration. **Tennant v. Peoria & P. U. Ry. Co.**, 321 U. S. 29, 34. See defendant's argument on this point at Tr. 161-162. The statement in the jury argument of defendant's counsel, stressed by petitioner in her reply brief, p. 3, note 1, refers to the later movement of the single ash or dump car (Tr. 44), not to the movement of cars upon which the coupler broke. See the argument referred to, as fully set forth at page 11 of this brief.

[2] Starting from the west end of track 5, there were three cars coupled together, then a space of about a car length, between the third and fourth cars, then a little gap, then the fifth and sixth cars, then a gap between them and the remainder of the train (Tr. 37, 78). These cars had failed to couple upon earlier movements into track 5, and presumably the drawbars were out of alignment or the knuckles were closed (Tr. 37, 70). It was this situation which the decedent went to track 5 to correct (Tr. 38). Starting from the west end of the track, as he did, the first coupler which he

3. Although Jack O'Donnell knew the exact sequence and timing of the movements made, there was nothing about the breaking of the coupler which suggested to him that any harm might have resulted to his brother from the movement in which the coupler broke.[3]

4. Jack O'Donnell did not see any body or any indication of an accident when sometime after this first movement, he walked down along the north side of the cars

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[2] (Continued)
would adjust was on the east end of the third car from the west, where plaintiff contends he was standing when the impact occurred. The fact that all the couplers "made" on that impact tended to show that he had completed the adjustment of the couplers on the fourth, fifth and sixth, and possibly the seventh car, which would place him at least 200 feet farther east. No reason is suggested in the record why, if he had completed the adjustment of the most easterly open coupler he would go back to the most westerly opening where, presumably, he had already made the adjustment. See defendant's argument at Tr. 162. The calculations made by petitioner's counsel in her reply brief, p. 10, note 2, omit the fifth and sixth cars, which also had not coupled (Tr. 35), so that the easternmost coupling to be aligned was more than two more car lengths or a total of about 200 feet, as we said. In any event, even petitioner's calculations place her decedent at the end of his duties nearly 100 feet east of where she claims he was struck.

[3] Jack O'Donnell's testimony on cross examination, was:

"Q. You knew your brother was somewhere down in that vicinity or at least he had gone down track 5 at the time you were moving this cut of cars out of track No. 2?

A. Yes.

Q. But there was nothing about that incident as it happened there that aroused any suspicion in your mind that anything might have happened to him in the course of the movement which had just been made at that time?

A. That is true" (Tr. 90).

Defendant's argument on this phase of the case is set forth at Tr. 163.

Petitioner in her reply brief suggests no other inference to be drawn from this testimony of her principal witness.

on track 5, flashing his lantern in between the cars to see if all the couplings had made. He walked "right alongside the track" for a distance of ten car lengths, right past the spot where his brother's body was later found and where, if he had been struck by the first movement, his body must have been lying along the north rail in the space between two of the cars where Jack flashed his lantern.[4]

5. When Jack O'Donnell found that his brother was not at the switchmen's shanty at the close of the night's work, the *first* place he looked for him was on the cars pulling out of the yard in the final movement (in which defendant contends the fatal accident occurred) the *next* place he looked was along track 1, where the crew had made a number of movements for which it was decedent's duty to line the couplers, and the *last* place he looked was at the west end of track 5.[5]

---

[4] See the testimony of Jack O'Donnell at Tr. 47, 48, 92, 93. If, as plaintiff claims, the decedent was struck as he attempted to adjust the coupler on the east end of the third car, then since the impact moved the cars about a car length (Tr. 89) and the drag marks along the track show his body was dragged 45 feet (Tr. 54, 125), which was the average length of the cars they were handling that night (Tr. 31), his body would have been right at the opening between the two cars and, we submit, Jack O'Donnell could not possibly have failed to see the body or the drag marks outside the north rail if the accident had occurred on the prior movement. Defendant's argument in which we referred to this evidence as "the most important fact in this case in determining whether the circumstantial evidence supports the plaintiff's theory" is set forth at Tr. 163-166. Whether, as petitioner argues in her reply brief, decedent's body would have been underneath the overhang of the car, and, if so, his brother would or would not have seen it, was clearly for the jury to decide.

[5] The decedent often rode out to the switchmen's shanty on this final movement of the repaired cars out of the repair yard (Tr. 96). Jack O'Donnell first went to the east end of

In conclusion defendant's counsel asked the jury to line up the undisputed circumstances "and determine from those circumstances in which of these two movements did this accident occur," pointing out that if it were equally likely or more likely that it occurred on the final movement, it was their "duty as jurors to return a verdict of not guilty" (Tr. 170, 171).

The circumstances now argued in petitioner's reply brief might have properly been argued to the jury in response to defendant's challenge to plaintiff's counsel "in his closing argument to tell you why it is more likely that the accident occurred in the first movement rather than

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[5] (Continued)

the yard and waited until the entire cut had moved out (Tr. 50, 96, 97); then he looked along the east end of Track 1 because he "thought maybe he had been walking up No. 1" (Tr. 50, 97); then he checked again at the shanty and with the engineer who had then returned (Tr. 50, 97); then he looked again along track 1, and finally along the west end of track 5 (Tr. 51, 97).

The crew had made a number of movements into track 1 after the coupler broke and the next to the last movement had been to shove the cars on track 1 to couple them all up (Tr. 65, 94, 95). The decedent knew these moves were to be made and part of his duties was to line the couplers for these movements (Tr. 36, 70). After all these movements had been made, he often rode out on the final movemnt (Tr. 96).

Defendant's argument that this evidence showed the probability that decedent was killed as he attempted to ride out of the yard on the final movement and also supported the inference that after he had completed his work on track 5, he had gone to track 1 to line the couplers there, thus accounting for the interval of time and the fact that Jack O'Donnell had not seen him along track 5, is set forth at Tr. 166-169.

Whether the foot-marks and the chip mark in the safety sign were made by the decedent at the time he was struck, or by someone else, or by him at an earlier time, and the significance to be attached to these facts, was well as the argument now made as to the manner of his falling, were also for the jury.

in the last movement" (Tr. 161). But even if he had, the jury was "free to discard or disbelieve whatever facts are inconsistent with its conclusion." *Lavendar* v. *Kurn*, 327 U. S. 645, 653. The single circumstance that when Jack O'Donnell walked down along track 5, in the interval between the two movements, he did not see his brother's body at the place where it was later found, justifies the inference that his brother was then alive and uninjured, just as would testimony that he actually saw him alive and well. The failure of petitioner's counsel to explain away this fact was the turning point of this case on the real issue upon which this case was tried and argued to the jury. This issue, to which defendant's counsel directed nearly his entire argument to the jury, was not 'only camouflage" as petitioner now argues; it was the basic issue from the opening statements to the closing arguments.

With two conflicting versions of how the accident happened before them, each sustained by inferences to be drawn from the evidence, the choice between them was for the jury. Neither party was entitled to have the court decide, as a matter of law, that either version was untenable. The Court of Appeals rightly said of this issue (171 F. 2d 973, 975; Tr. 246):

> "'Thus it is clear that the question was one of fact. The jury is the tribunal to decide that type of issue, *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 353; 63 S. Ct. 1062; 87 L. Ed. 1444, and while the jury was entitled to draw inferences from the evidence, nevertheless, plaintiff was required to present probative facts from which the negligence and causal relation could reasonably be inferred. *Tennant* v. *Peoria & P. U. Ry.*, 321 U. S. 29, 32; 64 S. Ct. 409; 88 L. Ed. 520. The choice of conflicting versions of the way the accident happened and the inferences to be drawn

from uncontroverted as well as controverted facts, are questions for the jury. *Ellis* v. *Union Pacific R. R.*, 329 U. S. 649, 653; 67 S. Ct. 598; 91 L. Ed. 572.

"In this case we cannot say that the evidence leads only to a conclusion other than that reached by the jury or that the jury reached a verdict that has no basis in the evidence. We are not warranted in setting aside a verdict where there are two versions in the evidence or where the evidence is so uncertain that no definite conclusion can be reached therefrom. To resolve such factual situations is clearly the province of the jury. *Lavendar* v. *Kurn*, 327 U. S. 645; 66 S. Ct. 740; 90 L. Ed. 916, and *United States* v. *Douglas Aircraft Co.*, 9 Cir., 169 F. 2d 755.

II

The Ruling Below—That the Fact that a Coupler Breaks While in Use is Evidence From Which a Jury May, But is Not Required to Infer a Violation of the Coupler Statute—is Sustained Both Upon Principle and Authority.

The principal question argued in the petition for writ of certiorari is petitioner's contention that the breaking of a coupler "in normal use" is conclusive evidence of a violation of the Safety Appliance Act (45 U. S. C. A. §2). We may note at the outset that no such question is presented by this record; the evidence shows that this particular stop, when the coupler broke, was a "violent stop" in response to "a very violent stop sign" or washout signal, when because of impaired visibility, earlier slow or stop signals had not been seen or obeyed (Tr. 41, 42, 83, 84). None of plaintiff's tendered instructions (Tr. 259-264), the objections to the instructions given (Tr. 194), the motion for new trial (Tr. 216-219, 221), or the statement of points relied upon (Tr. 224-230) qualified the fact of breaking by the phrase "in normal use" or any equivalent language. But passing that question and coming to

the merits of plaintiff's contention, we think that the language of the statute itself, and the decisions of this Court have settled for more than thirty years the rule that the fact that a coupler breaks while in use is evidence from which a jury *may infer* that the coupler did not comply with the statute, but is not *conclusive* evidence of such a violation.

Unlike other provisions of the Safety Appliance Act, which require the carrier to use "safe" or "efficient" or "secure" devices and appliances (45 U. S. C. A. 3, 4, 11, 23), the coupler provision of the Safety Appliance Act imposes a specific functional test: that the couplers shall "couple automatically by impact" and "can be uncoupled without the necessity of men going between the ends of the cars" (45 U. S. C. A. §2). The evils against which the statute was directed were those which attended the old-fashioned link and pin couplings and the purpose of the statute was to enable employees to couple and uncouple cars without going between the ends of the cars. *St. Louis and S. F. R. Co.* v. *Conarty,* 238 U. S. 243, 250. The *only* absolute duty imposed on the carrier is that the coupler shall comply with this specific functional test; there is no absolute duty that the coupler shall not break while in use, whether in normal use or in a very violent stop.

More than thirty years ago, in *Minneapolis, etc. R. Co.* v. *Gotschall,* 244 U. S. 66, in a unanimous opinion by Mr. Chief Justice White, this Court held that

> "• • • in view of the Safety Appliance Act, negligence *might be inferred* from the mere opening of the couplers." (Emphasis supplied.)

Two years later in *New Orleans, etc. R. Co.* v. *Scarlet,* 249 U. S. 528, this Court, in an opinion by Mr. Justice Bran-

deis, decided the precise question which plaintiff seeks to argue again here. In the *Scarlet* case, the accident was caused by the breaking of the king pin of the coupler and the coupling chains between the engine and the tender (249 U. S. at 529). In the trial court plaintiff had relied upon the state "*prima facie* act" as dispensing with proof of negligence; on appeal it was conceded that this error, as held in *New Orleans etc. R. Co.* v. *Harris,* 247 U. S. 367, and the judgment in plaintiff's favor must be reversed unless the error was harmless, as plaintiff contended, because "the mere breaking of the king pin and coupling chains shows conclusively that they were defective" and therefore violated the absolute duty imposed by the Boiler Inspection Act (45 U. S. C. A. §23), one of the Safety Appliance Acts. This is precisely the contention advanced by the plaintiff here. This Court held (p. 530):

> "* * * it is clear that the evidence did not establish as a matter of law that the king-pin or the chains were defective. At most it presented a question for the jury. Compare *Minneapolis & St. Louis R. R. Co.* v. *Gotschall,* 244 U. S. 66."

Following these decisions, the courts have uniformly held that the breaking of a coupler "does not demand a finding that the couplers were defective," but "at most presented a question for the jury." *Western & Atlantic R. R.* v. *Gentle,* 58 Ga. App. 252, 198 S. E. 257, certiorari denied, 305 U. S. 654; *Vigor* v. *Chesapeake & O. Ry. Co.* (C. C. A. 7), 101 F. 2d 865, 869, certiorari denied, 307 U. S. 635; *Cochran* v. *Pittsburgh & L. E. R. Co.* (D. C. Ohio), 31 F. 2d 769, 771; and see Roberts Federal Liabilities of Carriers (2nd Edition, 1929), §620, p. 1211. The Court of Appeals below correctly summarized this well-settled construction of the statute, saying (Tr. 247; 171 F. 2d 973 at 976):

"While the duty resting upon defendant to furnish couplers that complied with the Safety Appliance Act was absolute, and it has been held that the statute should be liberally construed 'so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act', *Brady* v. *Terminal R. R. Association,* 303 U. S. 10, 15, 58 St. Ct. 426, 429, 82 L. Ed. 614, we do not believe the Act required defendant to furnish couplers that would not break. We think the true rule is that where a coupler does break, the jury may, if they think it reasonable under all the circumstances, infer that the coupler was defective and was furnished and used in violation of the Act. The cases go no further than to hold that from the breaking of a coupler the jury may infer negligence. *New Orleans & N. E. R. R.* v. *Scarlet,* 249 U. S. 528, 39 S. Ct. 369, 63 L. Ed. 752; *Minneapolis & St. Louis R. R.* v. *Gotschall,* 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995, and *Vigor* v. *Chesapeake & O. Ry.,* 7 Cir., 101 F. 2d 865. Permitting the jury to infer negligence from the breaking of the coupler with no other proof of negligence, as in the *Gotschall* case, is a different thing from telling the jury they must find negligence from the breaking of the coupler. It is the difference between leaving the question to the jury and peremptorily instructing the jury to find for plaintiff."

Petitioner urged that there is "great divergence of judicial opinion" on this question and urged that the writ be granted to resolve this supposed conflict (Petition, p. 14). But upon examination, the supposed "conflict" disappears. While in some cases the courts have spoken in general terms of the carrier's duty to furnish "safe couplers" and "couplers which will remain coupled," *no case holds that the breaking of a coupler is as a matter of law a violation of the absolute duty imposed by the Safety Appliance Act.* In some of the cases cited by the plaintiff, the contention of the defendant was that upon the

facts of the case, as a matter of law, the breaking of the coupler was not the proximate cause of the accident; in those cases, except *Reetz* v. *Chicago & E. R. Co.*, 6 Cir., 42 F. 2d 50, the court held that the question was for the jury, and the verdict having been for the plaintiff, it would not be disturbed. See *Erie R. Co.* v. *Caldwell*, 6 Cir., 264 Fed. 947; *Keenan* v. *Director General*, 2 Cir., 285 Fed. 286. In several of the cases cited by the plaintiff as holding to the contrary, it clearly appears that the court also *submitted to the jury* the question whether the couplers violated the Safety Appliance Act, and what the court held was that the fact that the couplers broke was sufficient as a matter of law to support the jury's finding that the couplers were defective, not that the jury should have been peremptorily instructed so to find as a matter of law. See, for example, *Kowalski* v. *Chicago & N. W. Ry. Co.*, 159 Minn. 388, 199 N. W. 178;[6] *Southern Pacific Co.* v. *Thomas*, 21 Ariz. 355, 188 Pac. 268;[7] *McAllister* v. *St. Louis etc. Ry. Co.*, 324 Mo. 1005, 25 S. W. 2d 791;[8] *Philadelphia & R. Ry. Co.* v. *Eisenhart*, 3 Cir., 280 Fed. 271.[9] The fact that in these cases the jury de-

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[6] "The court submitted the case to the jury on the theory that a showing had been made which would support a finding of a violation of the Federal Safety Appliance Act." 199 N. W. at 179.

[7] "This evidence * * * is sufficient to justify the jury in finding as facts the answers to the three interrogatories, viz.: that the couplers were defective * * *." 188 Pac. at 269.

[8] "The issue of negligence submitted and upon which the jury was instructed was whether or not 'the coupler of one of the cases mentioned in the evidence was defective and broke' * * *." 25 S. W. at 796.

[9] "For evidence of negligence in support of the counts under the Safety Appliance Act, the plaintiff relied upon the inference of a defective coupler, drawn from the fact that the couplers uncoupled * * * the case was properly submitted and the verdict should be sustained on the inference of defendant's negligence to be drawn from the mere opening of the couplers." 280 Fed. at 272, 275.

cided the issue for the plaintiff does not mean that the issue must always be withheld from the jury and decided by the court.

The lower court decisions, upon which petitioner relies to create a supposed "conflict," are, as Mr. Roberts pointed out twenty years ago, merely "a conspicuous illustration of the dangers incident to so sweeping a generalization"; the "true rule to be deduced from the cases" is that "proof that the cars became uncoupled while in use, without human intervention, either because the coupler or some part thereof broke, or for some unexplained reason, is evidence from which a jury is *entitled to infer* that the coupler was not in condition to perform the function required of it by the statute, and hence that the Act was violated" (emphasis supplied). Roberts, Federal Liabilities *of Carriers* (2nd ed., 1929), Sec. 620; *Vigor* v. *Chesapeake & O. Ry. Co.*, 7 Cir., 101 F. 2d 865. Even evidence that upon a particular movement, a coupler failed to couple automatically by impact, or to uncouple at the first attempt is merely evidence from which a jury may properly find that the statute was violated. *Penn* v. *Chicago & N. W. Ry. Co.*, 335 U. S. 849, reversing 163 F. 2d 995; compare *Myers* v. *Reading Co.*, 331 U. S. 477. The fact that the coupler broke is no more conclusive evidence than this. But no case holds that it is proper to instruct the jury in effect that a single failure to couple automatically upon impact conclusively established defendant's violation of the statute.

This Court recently reaffirmed its sixty-year-old stand that

> "'* * * so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such

> questions as these as well as others.' *Jones* v. *East Tennessee R. Co.*, 128 U. S. 443, 445. And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence is that from which fair-minded men may draw different inferences.' *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 572. Such has ever since been the established rule for trial and appellate courts. See *Tiller* v. *Atlantic C. L. R. Co.*, 318 U. S. 67, 68."

That principle, announced in *Wilkerson* v. *McCarthy*, 69 S. Ct. 413, is applicable here. Petitioner contends that she should have been granted a peremptory instruction in her favor on this issue. But it was for the jury, under the long line of decisions of this Court, to determine from the fact of breakage, whether the coupler complied with the letter of the statute. The *Scarlet* and *Gotschall* cases have long since made clear the applicable rule of law: it is for the jury to determine, from the fact of breakage as well as from the other facts and circumstances, such as here the important fact that the coupler broke in a "violent stop" (Tr. 42) whether the coupler was furnished and used in violation of the specific command of the statute. The duty to comply with the statute is, of course, absolute and mandatory; but the question whether the statute has in fact been violated is for the jury. If, as this Court and the lower courts have so frequently held, the jury *may* infer a violation from certain facts, it follows necessarily that they may also *refuse* to draw that inference. All that petitioner can contend here is that the jury might have, but failed to draw the inference for which she contended. So long as juries are the triers of fact, that must always happen to one of the parties to the lawsuit.

Plaintiff urges in her reply brief that the contention now made by the defendant "is contrary to the theory upon which it tried its case." Reply brief, p. 11. Defend-

ant did plead that the Safety Appliance Act was not applicable to movements wholly within a repair yard, as these movements were (Tr. 14), but did not urge the point below. And defendant's counsel did save his right, by appropriate objections, to rely upon his alternative point based upon *Woods* v. *Chicago, B. & Q. R. Co.*, 306 Ill. 217, 137 N. E. 806, that the breaking of a coupler did not tend to prove a violation of the coupler statute. But the fact that the statements of defendant's counsel were made *by way of objection to the trial court's ruling* establishes conclusively that the case was submitted to the jury upon the theory that from the breaking of the coupler, the jury might infer, or find, that the statute had been violated. If the defendant did not win its verdict on the theory that the decedent was killed on the final movement out of the yard, then it won because the jury refused to draw the inference that the statute had been violated. Historically that was and is the privilege of the jury; its right to exercise that function cannot be denied as a matter of law.

III

There is No Error in the Court's Charge to the Jury.

1. Objection to instructions must be specific, and made before the jury retires.

Rule 51 of the Rules of Civil Procedure provides:

> "* * * No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Mr. Ryan's entire objection to the court's charge to the jury was as follows:

> "We object to the failure to state that the jury may regard the violation of the Safety Appliance Act as

negligence in and of itself and which is in itself sufficient to require them to find a verdict in favor of the plaintiff.

"One more thing:

"I object specifically to the instruction that if the jury believe it were a mere accident, that no recovery could be had because of the fact that the undisputed evidence shows that the coupler broke, and that if there were a violation of the Safety Appliance Act the mere accident instruction is inapplicable. It entices the jury to find by reaching a conclusion contrary to law.

"I have one objection to make on the ground that if they find there was a violation of the Safety Appliance Act they must further find it was the proximate cause of the accident on the ground that if it were the proximate contributing cause of the accident the jury would be required to find a verdict for the plaintiff" (Tr. 194).

In *Palmer* v. *Hoffman,* 318 U. S. 109, this Court said (p. 119):

"* * * a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. See *Lincoln* v. *Claflin,* 7 Wall, 132, 139; *Beaver* v. *Taylor,* 93 U. S. 46, 54-55; *Mobile & Montgomery Ry. Co.* v. *Jurey,* 111 U. S. 584, 596; *McDermott* v. *Severe,* 202 U. S. 600, 611; *Norfolk & W. Ry. Co.* v. *Earnest,* 229 U. S. 114, 122; *Pennsylvania R. Co.* v. *Minds,* 250 U. S. 368, 375.

"That long standing rule of federal practice is as applicable in this type of case as in others."

While not under the Federal Employers' Liability Act, the *Palmer* case was a negligence action for personal injuries, and is controlled by the same principles of trial and appellate court practice which govern this action. Within those well-settled principles, there was no error in the instructions here.

2. The court committed no error in the instructions on the coupler statute.

Petitioner's objection in the court below to the failure to instruct that "the violation of the Safety Appliance Act was negligence in and of itself and * * * sufficient to require them to find a verdict in favor of the plaintiff" is predicated upon her erroneous theory that the breaking of a coupler was negligence *per se* and conclusively established a violation of the coupler provision of the Safety Appliance Act (45 U. S. C. A. §2). Her counsel tendered no instruction stating the correct rule that from the fact that the coupler broke the jury might infer that the coupler did not comply with the statute. Having in mind the plaintiffs requested instructions and following the practice suggested in *Levin* v. *Seagram & Sons,* 7 Cir., 158 F. 2d 55, defendant's counsel inquired, prior to the argument to the jury, how the court intended to instruct the jury with reference to plaintiff's contention "that a coupler which breaks in half as this one did, violates the coupler provision of the Safety Appliance Act," and the court stated:

> "I intend to instruct the jury on the law as to the Federal Safety Appliance Act, and let them decide whether under my instructions on the law, such a breakage is a violation thereof" (Tr. 144).

The court did so instruct the jury, saying (Tr. 186):

"Now in the last two charges of the plaintiff's complaint referred to there has been a lot of discussion about this Federal Safety Appliance Act insofar as it applies to this particular case. I will read it to you. It provides in Section 2 of Title 45 of the United States Code Annotated, as follows:

> " 'It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers or coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.'

"That is the statute. Now, that statute places upon the railroad engaged in the type of business that this railroad was engaged in at the time of this occurrence an absolute duty to provide the couplers which I have just read to you from the statute, and to provide them in such order as the statute indicates."

and, a little later (Tr. 188):

"Now, if you believe from a preponderance of the evidence, and I will tell you what that means in a little while, under the instructions of the Court, that the defendant, at the time and place in question, used and operated a car with a defective coupler, contrary to the provisions of the Federal Safety Appliance Act, and that said coupler broke, and that as a direct and proximate result thereof, the plaintiff's decedent sustained injuries which resulted in his death, then you may find the defendant guilty. But as I said before, in the event you find that such violation of the Federal Appliance Act is the proximate cause of his death, then negligence or contributory negligence on the part of the decedent is entirely immaterial and does not affect his right to recover the amount of damages."

This latter portion of the charge is substantially as requested by plaintiff's proposed instruction No. 5 (Tr. 261) with the correct substitution of "may find" for the peremptory "should find." Under the cases we have cited, these portions of the charge properly submitted to the jury the question whether the coupler violated the test of the statute.

These instructions did not leave to the jury any legal question as to the construction of the statute. The court told the jury just what the statute provides; that the railroad was under "an absolute duty" to provide such couplers; and that if the defendant used and operated a car with a defective coupler, contrary to the statute, and the coupler broke, and as a direct and proximate result thereof, plaintiff's decedent came to his death, they might find the defendant guilty. While this charge does not embody plaintiff's mistaken notion as to the applicable rule of law, the charge does state the correct rule, and left to the jury's determination the two basic questions of fact: first, did the coupler comply with the statute, and second, did the broken coupler cause the man's death. The court would not have been justified in embellishing the statute by referring to "safe coupling devices" or generalizing about "defective couplers." The statutory test is simple and readily understandable; no further explanation than the words of the statute was necessary, nor, for that matter, was any such elaboration ever requested by the plaintiff in the trial court.

In his dissenting opinion in the court of appeals, Judge Minton predicated error on the failure of the trial court to instruct the jury that it might infer negligence from the breaking of the coupler. Judge Minton recognizing that plaintiff did not object to this failure to instruct as required by Rule 51 and the well-settled federal appellate

practice (Tr. 250; 171 F. 2d at 978). But in plaintiff's petition for rehearing in the Court of Appeals, her counsel insisted "it was not our theory in the trial court, nor is it in this court, that the breaking of a coupler is merely ground for an inference of a violation of the Act." Petitioner has not only waived in the trial court any right to rely upon the proposition advanced by Judge Minton, but she expressly repudiated it in the Court of Appeals.

Finally, petitioner argues that defendant's counsel misstated the law as to the carrier's duty with reference to couplers in his argument to the jury. Inasmuch as plaintiff's counsel had argued that the statutes "make the railroad company absolutely liable in this case if a coupler broke" (Tr. 146), we think the argument of defendant's counsel properly directed the jury's attention to the language of the statute as the court had stated he intended to, and later did charge the jury. The court's ruling:

> "The jury will be governed by what the court instructs them as to the law and not what counsel says * * * you will take your instruction as to the law from the court" (Tr. 146)

removed any possibility of prejudicial error from any misstatement of either counsel as to the law. The court also pointed out to plaintiff's counsel that "you will have a chance to protest when you answer him" (Tr. 159). When his chance came, he dismissed it summarily with "I don't have to waste time discussing it" (Tr. 177).

We respectfully submit that the trial court correctly instructed the jury, as he had indicated in advance he would, as to the language of the statute and the "absolute duty" imposed thereby. If plaintiff's counsel desired any elaboration of the instruction, telling the jury that while the breaking of the coupler was not conclusive evidence of negligence, it was nonetheless some evidence from which

they might infer negligence, it was his duty, under the rules, specifically to call this to the attention of the trial judge and to request such an instruction. The trial court's ruling to which defendant's counsel was objecting (*supra*, p. 25) show very clearly that the court would have so instructed the jury if such a request had been made. In the absence of any such request, it is too late for counsel in his reply brief in this Court to suggest for the first time that there was error in the trial court's failure to instruct that the jury "had the right to infer negligence" from the breaking of the coupler.

3. The instructions did not confuse negligence with the charges of violation of the Safety Appliance Act.

The complaint originally charged five "negligent acts" (Tr. 5), two of which, (d) and (e), were withdrawn by the plaintiff at the close of the case (Tr. 139) and one of which, (c), was amended (Tr. 13). The charges which went to the jury were that the defendant:

> "(a) Carelessly and negligently propelled and impacted two or more of the said cut of cars upon and against the cars projecting out on the west rip lead at the place aforesaid.
>
> "(b) Carelessly and negligently failed to equip and maintain on the cars standing on No. 5 rip track, couplers which would couple automatically by impact without the necessity of men going between the ends of cars, contrary to the provisions of the Safety Appliance Act.
>
> "(c) Carelessly and negligently failed to equip and maintain on one of the cars being moved along the said track, a safe and efficient coupler which would remain coupled to the car to which it was attached, but which, on the contrary, was so defective and insecure that it broke loose from said car, contrary to the provisions of the Federal Safety Appliance Act."

Plaintiff's tendered instruction No. 1 repeated these charges, omitting only the word "carelessly" (Tr. 260). Thus the plaintiff herself posed her case on charges that the defendant "negligently" violated the Safety Appliance Act, in addition to ordinary negligence in the movement of the cars.

The trial judge, however, carefully drew the distinction between the two charges in his instructions. In summarizing the allegations of the complaint, he pointed out that the second and third "acts of negligence which she charges" were the failure to equip and maintain the described couplers (Tr. 183); he pointed out that these allegations "charge specific acts in violation of the Federal Safety Appliance Act" (Tr. 183); that the defendant was under "an absolute duty to provide the couplers • • • in such order as the statute indicates" (Tr. 186); that the first determination to be made by the jury was "whether or not the defendant is guilty of one or more or all of these acts of negligence" (Tr. 187); that contributory negligence must be considered on the first charge but that as to the charges of violation of the Safety Appliance Act, "contributory negligence does not enter into it at all" and "has no bearing whatever in this matter" (Tr. 187); and, finally, that if they believed that the defendant "used and operated a car with a defective coupler, contrary to the provisions of the Safety Appliance Act, and that said coupler broke", which caused the death of plaintiff's decedent, "then negligence or contributory negligence • • • is entirely immaterial and does not affect his right to recover" (Tr. 188). Notwithstanding the fact that under both the allegations of her complaint and her tendered instructions, plaintiff would have been required to prove that the defendant "negligently" used a coupler which violated the statute, the trial judge, in his instructions to

the jury, carefully drew the distinction between the charge of ordinary negligence and the charges of violation of the coupler statute. He told the jury that the use of a coupler which violated the statute in itself was the act of negligence charged in the second and third specifications of negligence; that if the jury found the defendant used such a defective coupler and the coupler broke "negligence is entirely immaterial." Certainly these instructions told the jury that the use of a coupler which violated the statute was an act of negligence and in itself sufficient to impose liability upon the defendant if the broken coupler caused the man's death; to add that it was also "negligence *per se*" could not have aided a jury of average American citizens unfamiliar with Latin phraseology.

Petitioner argues that the court's "charge as a whole" would lead the jury to understand that "plaintiff had to prove negligence" and that "this requisite was not confined, as it should have been, to the first charge of negligence, but applied as well to the charges of violation of the Safety Appliance Act." But no such objection to the "whole charge" was taken in the trial court, and "where part of the charge was correct he may not through a general exception obtain a new trial." *Palmer* v. *Hoffman*, 318 U. S. 109, 119. We submit that the assertion that the "charge as a whole" presents no assignment of error other than that petitioner is dissatisfied with the outcome of the trial. The Court of Appeals, composed of experienced *nisi prius* judges, familiar with the problems of jury trials correctly concluded (Tr. 248; 171 F. 2d at 977):

> "Moreover, upon examination of all the instructions given, we find that the court correctly explained to the jury, the issues and the law applicable thereto. He told the jury that if they found the coupler did not comply with the requirements of the statute and that as a result O'Donnell had been killed in the movement

which followed, they could find defendant guilty. He distinctly and in express terms called attention to the three grounds of liability charged, and the statutes involved. He defined negligence, proximate cause, the preponderance of the evidence and instructed them as to the limited extent to which contributory negligence entered into the issues. Under these circumstances we do not believe that the instructions considered as a whole were erroneous."

4. The court properly instructed the jury on the question of proximate cause.

Petitioner also complains of that portion of the charge by which the jury was instructed that the mere happening of the accident by which the decedent lost his life does not in and of itself create a liability upon the defendant; that the fact of such an accident carries no presumption of negligence; that the evidence must point to the fact that the defendant was guilty of one of the three allegations of negligence in plaintiff's complaint; that they could not guess between the various causes of the accident and find that the negligence charged was the proximate cause of the accident if there was no satisfactory foundation for such a conclusion.

The only exception taken in the trial court which might refer to this portion of the charge was to "the instruction that if the jury believe it were a mere accident, that no recovery could be had * * * if there were a violation of the Safety Appliance Act the mere accident instruction is inapplicable." (Tr. 194). The jury were not instructed that if there were a mere accident, there could be no recovery; the jury were instructed that "the mere happening of an accident by which the plaintiff's decedent lost his life does not in and of itself create a liability upon the defendant to pay for it." (Tr. 187). This is precisely what the court held in *Brady* v. *Southern Ry. Co.* 320 U. S. 476, 484:

"Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury".

The Court of Appeals properly realized that this instruction was directed to the question of proximate cause, saying (Tr. 248; 171 F. at 977):

"The criticized instruction is directed to the question of proximate cause. It correctly cautioned the jury that they could not presume from the fact of the accident that O'Donnell was killed because of the breaking of the coupler. *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 483."

The "accident" referred to in this instruction is not the breaking of the coupler, but is the running over of the decedent. The real issue in this case was whether the accident in which O'Donnell was killed occurred on the first movement, as to which negligence was charged, or on the final movement out of the yard. The fact that he was accidentally killed did not give rise to any presumption that it was one movement rather than the other. Liability arises from negligence; not from the mere fact of injury. *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 434. Mere speculation cannot do duty for probative facts. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29. The challenged instruction properly protected the defendant against a verdict based upon sympathy and guess-work. Petitioner's criticism wholly misunderstands the subject matter of this instruction.

Petitioner also complains because later in the charge, after charging what constituted negligence, what the charges of negligence were, and the definition of proximate cause, the court repeated that "as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant"; that the plaintiff must prove one or more of the

three alleged grounds of negligence, not that the defendant was possibly guilty of the negligence charged; and if it was uncertain as to which movement caused the decedent's death, the jury had no right to guess between them and find that the negligence charged was the proximate cause of the accident "if there is no satisfactory foundation in the testimony for that conclusion" (Tr. 189).

The Court of Appeals correctly pointed out that "all the instructions must be considered together as one charge." (Tr. 248; 171 F. 2d at 977) As another court has recently put it:

> "It is not difficult to destroy almost any charge by isolating certain limited expressions therein, but the charge must be considered as a whole with a view of determining the impression conveyed thereby to the jury." *S. S. Kresge Co.* v. *McCallion,* 8 Cir., 58 F. 2d 931, 934.

Considering the charge in entirety, there can be no doubt that by the use of the word "accident" the court was referring to the running over of the decedent, not to the fact that a coupler broke, and that what the particular portion of the charge now being considered meant was that plaintiff had the burden of proving by the preponderance of the evidence, not by mere guesswork, that the decedent was run over because the defendant was guilty of one or more of the three charges of negligence, two of which were the asserted statutory violations. Nothing in this portion of the instruction, taken by itself, or considered in connection wth the charge as a whole, could be regarded as a direction to disregard the breaking of the coupler in determining the issues of negligence.

Judge Minton in his dissenting opinion recognized that if this instruction be deemed to refer to the breaking of

the coupler, it was appropriate where only common law negligence is considered, but not controlling upon the charge of a violation of the coupler statute. But even if the instruction is so construed, there still remains the failure of counsel to call the objection specifically to the court's attention. This is precisely the question upon which this Court passed in *Palmer* v. *Hoffman,* 318 U. S. 109. That, case like this, was an action for negligence, with charges of both statutory and common law negligence. This Court held (p. 119):

> "As we have noted, petitioners in their exceptions to the charge given and in the requested charge did not differentiate between the cause of action based on the Massachusetts statute and those on the common law. Even if we assume that the charge on the latter was erroneous, we cannot say that the charge was incorrect so far as the statutory causes of action were concerned. Likewise we must assume that it would have been error to give the requested charge on the statutory causes of action even though we accept it as the correct charge on the others. Under these facts a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. See *Lincoln* v. *Claflin,* 7 Wall. 132, 139; *Beaver* v. *Taylor,* 93 U. S. 46, 54-55; *Mobile & Montgomery Ry. Co.* v. *Jurey,* 111 U. S. 584, 596; *McDermott* v. *Severe,* 202 U. S. 600, 611, *Norfolk & W. Ry. Co.* v. *Earnest,* 229 U.S . 114, 122; *Pennsylvania R. Co.* v. *Minds,* 250 U. S. 368, 375.
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> "That long standing rule of federal practice is as applicable in this type of case as in others. That rule cannot be avoided here by reason of the requested

charge. For, as we have said, it was at most only partially correct and was not sufficiently discriminating."

The obligation of this plaintiff to try her case, and to make her objections in accordance with the rules is same as that of the plaintiff in the *Palmer* case; she has no greater rights because she proceeds under the Federal Employers' Liability Act. Plaintiff's counsel has had a long experience in personal injury litigation (see *Ryan* v. *Pennsylvaina R. Co.*, 268 Ill. App. 364, 369); if from his experience, he did not deem the matter of sufficient importance to make specific objection at the time, and give the court an opportunity to correction any misapprehension which might be conveyed to the jury, wholly unintentionally, by this instruction, it was his duty under the rules to make objection then. After he has failed to persuade the jury, he cannot be permitted to comb through the record for some possibly-misunderstood charge in order to secure a new trial.

We respectfully submit this case was fairly tried upon a single clear-cut issue: did the accident happen when the plaintiff claims, on the first movement, or did it happen when the train was being pulled out of the yard, and decedent attempted, as he frequently did, to ride out on the cars to the switchman's shanty? The trial court fully instructed the jury on the charges upon which liability was claimed, on the statute and the absolute duty it placed on the carrier, on the meaning of negligence and proximate cause, on contributory negligence and its limited application, on the burden of proof and what constitutes the preponderance of the evidence. Only hypercritical and belatedly-interposed objection is taken to the court's charge; at the time of trial, with the evidence, the arguments of counsel and the court's instructions clearly in mind, plaintiff's counsel saw none of the criticisms which he now makes.

We believe the jury returned a verdict for the defendant because they believed the defendant's theory of how the accident happened. Both courts below, Judge Minton concurring, held the evidence sufficient to sustain the verdict. This Court should not deprive the defendant of its hard-won victory because of any objections to instructions which were first urged after verdict in this case.

CONCLUSION

This is not a case in which plaintiff was "deprived of all benefit of the Safety Appliance Act." It is simply a case in which plaintiff's counsel failed to convince the jury that the decedent was killed in the movement in which she charged the Safety Appliance Act was violated.

We think plaintiff lost her case not because the jury were in any way confused about the absolute duty imposed by the coupler statute or the probative force to be given to the fact that a coupler broke, but because her counsel could not explain to the jury how, if William O'Donnell were struck by the first movement of cars, his brother Jack could walk "right alongside the track" past his brother's body and not see it. The jury found that he was not killed as the result of the broken coupler and not one of the errors charged here could have affected that verdict. And even if the jury concluded that the broken coupler was not a violation of the specific functional test of the statute, that was their prerogative. The plaintiff had a full and fair trial, the errors complained of did not affect its outcome and the verdict of the jury approved by both courts below should not be disturbed.

Respectfully submitted,

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